IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MARK NATHANSON, ET AL.	:	
	:	CIVIL ACTION
	:	
v.	:	
	:	No. 01-CV-3377
AETNA CASUALTY AND SURETY COMPANY, ET AL.	:	

MEMORANDUM

Ludwig, J. November 7, 2001

This is an action for breach of an insurance contract, bad faith, and promissory estoppel in which defendants[1] move: (1) to amend the answer to assert a statute of limitations defense and to plead a misrepresentation counterclaim; and (2) to sever all extra-contractual claims and for a stay of extra-contractual discovery. Jurisdiction is diversity and supplemental. 28 U.S.C. §§ 1332, 1441 and 1446. Over plaintiffs' objections, the motion to amend will be granted and the motion to bifurcate and stay will be denied.

I. Motion to amend - granted.

If not raised in the initial answer, a statute of limitations defense is waivable. Fed. R. Civ. P. 8 (c), 12 (h). However, under Rule 15 (a), a party may be permitted to amend and "leave shall be freely given when justice so requires." Fed. R. Civ. P. 15 (a).

"In the absence of substantial or undue prejudice, denial instead must be based on bad faith or dilatory motives, truly undue or unexplained delay, repeated failures to cure the deficiency by amendments previously allowed, or futility of amendment."

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[1]Defendants are Aetna Casualty and Surety Company, Travelers Indemnity Company, and the Automobile Insurance Company of Hartford. Plaintiffs are Mark and Jayne Nathanson, husband and wife.

Lorenz v. CSX Corp., 1 F.3d 1406, 1413-14 (3d. Cir. 1993), citing Heyl & Patterson Int'l Inc. v. F.D. Rich Housing of Virgin Islands, Inc., 663 F.2d 419, 425 (3d Cir. 1981). "Prejudice to the non-moving party is the touchstone for the denial of an amendment." Id., quoting Cornell & Co. v. Occupational Safety & Health Review Comm'n, 573 F.2d 820, 823 (3d Cir. 1978). In this context, prejudice means "undue difficulty in prosecuting a lawsuit as a result of a change of tactics or theories on the part of the other party." Deakyne v. Commissioners of Lewes, 416 F.2d 290, 300 (3d Cir. 1990).

Here, the original answer was filed on July 5, 2001 and there have been no case management or trial preparation developments that would amount to prejudice. See Bechtel v. Robinson, 886 F.2d 644, 652 (3d. Cir. 1989) (motion to amend complaint granted, Fed. R. Civ. P. 15 (c) - no prejudice will result because case was in the early stages of discovery).

As to defendants' inclusion of a counterclaim in the amended answer, a party may obtain permission to allege a counterclaim that was omitted "through oversight, inadvertence, or excusable neglect, or when justice requires." Fed. R. Civ. P. 13 (f). Leave to do so is favored, 6 Wright & Moore, Federal Practice and Procedure § 1430 at 213 (2d Ed. 1990), and there appears to be no reason to sustain plaintiffs' objections in this case.[2]

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[2]Although the wording of Rule 13 (f) differs from Rule 15 (a), this variation has not led to significantly different standards for granting leave to amend. 6 Wright & Miller, Federal Practice and Procedure § 1430 at 227 (2d Ed. 1990). If anything,"the clause in Rule 13 (f) permitting amendments 'when justice requires' is especially flexible and enables the court to exercise its discretion and permit amendment whenever it seems desirable to do so." Perfect Plastics Indus. v. Cars & Concepts, 758 F. Supp. 1080, 1081-82 (W.D.Pa. 1991).

II. Motion for bifurcation and stay - denied.

Defendants request bifurcation of the contractual and extra-contractual claims so as to avoid undue prejudice and promote judicial efficiency. Defendants' Brief in Support of Motion for Bifurcation and Stay at 1. Under Fed. R. Civ. P. 42 (b), issues may be severed and tried separately, "in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy. . ." Fed. R. Civ. P. 42 (b). However, bifurcation is an infrequent exception. 9 Wright & Miller, Federal Practice and Procedure § 2388 at 474 (2d Ed. 1994) ("The piecemeal trial of separate issues in a single lawsuit or the repetitive trial of the same issue in severed claims is not to be the usual course."). The party moving for separate trials has the burden of proving that it is necessary "in light of the general principle that a single trial tends to lessen the delay, expense and inconvenience to all parties." McRae v. Pittsburgh Corning Corp., 97 F.R.D. 490, 492 (E.D. Pa. 1983).

Here, plaintiffs' contractual and extra-contractual claims are interrelated and bifurcation would be likely to lead to additional inconvenience and delay, not less. The bifurcation request will therefore be rejected.

Whether plaintiffs' bad faith claim will survive if the contract claim is dismissed on the merits need not be decided at this time. See Zurich Ins. Co. v. Health Systems Integration, Inc., 1998 WL 211749 at 3 (E.D.Pa. 1998) (denying severance of bad faith claim and stay of discovery because a decision on the outcome of the case would be premature).

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Edmund V. Ludwig, J.